216292

STEPTOE & JOHNSON LLP

ATTORNEYS AT LAW

Samuel M. Sipe Jr.
Anthony J. LaRocca
202.429.6486
ssipe@steptoe.com
alarocca@steptoe.com

1330 Connecticut Avenue, NW
Washington, DC 20036-1795
Tel 202.429.3000
Fax 202.429.3902
steptoe.com

February 15, 2005

Mr. Leland L. Gardner, Director
Office of Economics, Environmental Analysis and
Administration
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

RE: BNSF Objections to Waybill Request 456-1

Dear Director Gardner:

Pursuant to 49 C.F.R. § 1244.9(d)(3), BNSF files this objection to release of the data sought in Waybill Request 456-1, notice of which was filed in the Federal Register on February 1, 2006 (Fed. Reg. Volume 71, No. 21 p. 5409).

In a letter dated January 25, 2006, Nicholas DiMichael of the law firm of Thompson Hine LLP and Andrew P. Goldstein of the law firm McCarthy, Sweeney and Harkaway, LLP ("Applicants") asked the STB's Office of Economics, Environmental Analysis and Administration to grant them access under 49 C.F. R. § 1244.9(c) to certain data from the STB's Costed Waybill Sample. Specifically, Applicants seek waybill data, using *unmasked* revenues, for the following:

- All BNSF movements with a revenue to variable cost ratio of less than 100 for the years 2000-2004; and

- All movements of wheat on BNSF, the Union Pacific Railroad Company, and the Canadian Pacific Railway Company with revenue to variable cost ratios greater than 180 percent for the same years.

As purported justification for the data request, Messrs. DiMichael and Goldstein stated that they were "retained by the State of North Dakota as outside counsel to investigate and provide guidance to the State for the possible filing of a Complaint under the *Small Case*

Guidelines."[1] Request at 2. Applicants further claim that the data they seek will assist them in their investigation of possible litigation because the data supposedly are relevant to the standards set out by the Board in its *Small Case Guidelines*. According to the request, Messrs. DiMichael and Goldstein were appointed "Special Assistant Attorney Generals" for the State of North Dakota and request the data for analyses being performed for the State. They allege that the requester "is not a shipper, but the government of a State of the United States." Request at 2.

BNSF objects to the requested disclosure of data and requests that the Board deny the application in its entirety. As explained in more detail below, disclosure of unmasked revenues would be unprecedented and inconsistent with the provisions of 49 C.F.R. § 1244, the regulations that govern access to the Waybill Sample. The Board has never allowed unmasked revenue data to be disclosed to persons other than selected Board staff. Moreover, Applicants' request is a blatant fishing expedition in search of data that *might* support a rate reasonableness case and *might* identify a shipper willing to bring such a case. The Board's regulations do not permit access to confidential waybill data for such purposes.

I. THE APPLICANTS' REQUEST FOR DATA SHOULD BE DENIED BECAUSE APPLICANTS SEEK UNMASKED REVENUE DATA THAT ARE NOT SUBJECT TO DISCLOSURE UNDER 49 C.F.R. 1244.9.

Congress unambiguously provided for the protection of confidential shipper-specific data. *See* 49 U.S.C. § 11904. Thus, a common carrier is prohibited from disclosing certain sensitive, movement-specific data without the shippers' consent, and penalties are imposed on persons that disclose confidential information received from a common carrier. *Id.* The Board's regulations governing access to confidential waybill data were adopted with Congress' confidentiality concerns firmly in mind. *See Procedures on Release of Data from ICC Waybill Sample ("Waybill Procedures"),* ICC Ex Parte No. 385 (Sub-No. 2), 4 I.C.C.2d 194, 1987 ICC LEXIS 377 at * 7-11 (1987).

There are two distinctive features to the regulations set up to give effect to Congress' confidentiality concerns. First, the regulations specify groups of potential users of the data that can have access to waybill data and further specifies the limited data that each group can receive. *See Waybill Procedures* at *12-14, 51-55. Second, the regulations expressly provide that railroads may encrypt the revenue data for contract movements while identifying the movements for which encrypted, or masked, revenues were submitted. The railroads must provide the Board with information on the masking formulae that are used so that the Board may carry out internal studies using actual revenue data. The regulations governing encryption of revenue data are discussed in *Modification of the Carload Waybill Sample and Public Use File Regulations,* STB Ex Parte No. 385 (Sub-No. 4) (served June 16, 2000).

---

[1] Ex Parte No. 347 (Sub-No. 2), *Rate Guidelines – Non-Coal Proceedings,* 1 S.T.B. 1004 (1996).

Nowhere in these detailed regulations is there even a hint that unmasked waybill revenue data would be disclosed under any circumstances to any person seeking access to the waybill data. Indeed, the idea that unmasked revenue data would ever be disclosed is directly contrary to the scheme of the regulations, which permit railroads to encrypt the data. In the notice of final rules for § 1244.3 published in the Federal Register, the Board rejected a participant's suggestion that actual contract revenues might be disclosed under limited circumstances, such as in the context of rate reasonableness cases, stating that "Our long-standing policy is not to release actual contract revenues reported in the confidential waybill sample because of the potential for commercial harm to both the contracting railroad and shipper." *49 C.F.R. Part 1244, Modification of the Carload Waybill Sample and Public Use File Regulations Final Rules, 65 FR 37710.* The Board found no compelling reason to change its general policy with respect to release of unmasked contract data to address the needs of parties in litigation. Rather, it held that the issue of access to particular contract information is best addressed through discovery on a case-by-case basis. *Id.*

The Board has repeatedly stated that it does not permit disclosure of the masking factors used in preparing the waybill data or the unmasked contract revenue data under any circumstances. *See CSX Corporation, et al – Control and Operating/Lease Agreements – Conrail ("Conrail"),* Finance Docket No. 33388, Decision No. 42 at 7 (served Oct. 3, 1997) ("masking factors . . have never been intended to be made available to any persons not on the Board's staff."); *Duke Energy v. Norfolk Southern ("Duke Energy")* at 4, STB Docket No. 42069 (served April 2, 2005) (noting the Director's disapproval of complainants' waybill request using unmasked revenues on grounds that the decision was consistent with the Board's "policy not to release masking factors..."). The Director's decision stated that "[t]he Surface Transportation Board's long standing policy is that the unmasked revenues and the specific masking factors that you request are highly confidential, for internal Board use only, and not to be released to waybill users." Letter from Michael A. Redisch, Acting Director to C. Michael Loftus, February 4, 2005.

As the Board has explained, this rule against disclosure of unmasked revenue data is grounded on important policy considerations. In *Conrail,* the Board noted that "[t]he confidentiality of each railroad's masking factors has been essential to the Board's effort to gather the data it needs to fulfill its statutory duties" *Conrail* at 7, and that "even the existence of the protective order applicable to this proceeding cannot justify the forced production of the [railroad's] masking factors." *Id.* at 8, n. 28.

Applicants' claim that the Board "established a high standard for the release of Costed Waybill Data using unmasked revenues" in C*onrail* and *Duke Energy* is wrong. *See* Applicants' Request at 2. There is *no* standard, high or otherwise, governing access to unmasked revenue data because the Board does not permit such access under any circumstances. The issue in *Conrail* was whether a person could go around this prohibition on access to unmasked revenue data through a waybill data request by seeking a railroad's masking factors in discovery. As the Board explained, it considered "whether movants can obtain from applicants, though the regular

discovery process, the masking factors they would not be allowed to obtain under [former] 49 C.F.R. 1244.8(b)(4). We hold that they cannot." *Conrail* at 7.

In short, the Board's regulations do not authorize disclosure of unmasked revenue data from the Waybill Sample, and the ICC and the Board have consistently denied requests for access to that data or to the factors used by railroads to encrypt the revenue data. The question whether a party to litigation would be entitled to receive actual contract revenues through discovery is not before the Board since no case is pending. Applicants' request is a request for data from the Waybill Sample and it should be denied.

II. THE DATA REQUEST SHOULD BE DENIED BECAUSE IT SEEKS DATA BEYOND THAT TO WHICH APPLICANTS ARE ENTITLED AS REPRESENTATIVES OF NORTH DAKOTA OR AS TRANSPORTATION PRACTITIONERS

As noted above, the Board's regulations governing the disclosure of the Waybill Sample identify specific groups of users to whom the Waybill Sample may be disclosed and further specify the types of data that can be disclosed to each group. Applicants potentially fall into two of those groups -- representatives of a State (49 C.F.R. § 1244.9(b)(3)) and transportation practitioners (49 C.F.R. § 1244.9(b)(4)). Neither group of potential users is entitled to the data sought by Applicants in Waybill Request 456-1. Applicants cannot circumvent the specific limitations on access to data available to particular user groups by seeking access under the Other Users provision of the regulations, 49 C.F.R. § 1244.(c). For this reason, independent of the prohibition on disclosure of unmasked revenue data, the request should be denied.

When the ICC adopted its regulations governing the disclosure of waybill data, its objective was to "exercise tighter controls over the release of waybill data to prevent unnecessary disclosures and potential abuses." *Waybill Procedures at *12.* The final rules embraced the agency's existing policy to limit release both with respect to the types of data and the types of users, with refinements based on its experience. The new procedures were "designed to add further safeguards to the existing policy." *Id.* at *11. Thus, the final procedures identified five classes of users of the Waybill Sample, each with access to specific and limited types of data. The five classes of specified users are Railroads (1244.9(b)(1)); Federal Agencies (1244.9(b)(2)); States (1244.9(b)(3)); Transportation Practitioners, Consulting Firms, and Law Firms (1244.9(b)(4)); and Public Use (1244.9(b)(5)).

Applicants are transportation practitioners who state that they are currently engaged as representatives of the State of North Dakota. They potentially fall within two groups of users specified in the regulations. As representatives of the State of North Dakota, Applicants appear to fall within the scope of 49 C.F.R. § 1244.9(b)(3). That provision, however, limits the data provided to States to waybill records pertaining to traffic that was originated, terminated, interchanged in, or that passed through the state. As representatives of a state, Applicants are not entitled to receive BNSF's system-wide waybill data -- even with encrypted revenues. The State of North Dakota is entitled to examine the waybill data corresponding to movements affecting its

state, subject to appropriate confidentiality protections, as a sovereign safeguarding the interests of its citizens. The Board's regulations recognize that the State of North Dakota has no legitimate interest in or entitlement to data corresponding to movements that do not directly affect state interests.

Applicants also potentially fall within 49 C.F.R. § 1244.9(b)(4) -- Transportation Practitioners, Consulting Firms, and Law Firms. Messrs. DiMichael and Goldstein are members of law firms and regularly appear before the Board in contested matters. In fact, they acknowledge that they seek the waybill data to study the prospect of bringing rate reasonableness litigation before the Board. But 49 C.F.R. § 1244.9(b)(4) has a specific and important limitation -- litigation must be pending before the Board before access is given to transportation practitioners. That regulation specifies that the data must be sought for purposes of "specific proceedings" and the data must be "relevant to issues *pending before the Board.*" The regulations therefore are clear that transportation practitioners like Applicants are not entitled to waybill data for the purpose of studying the prospect of future litigation or preparing for litigation, the Applicants' avowed purpose.

Indeed, the Board specifically ruled in the *Small Case Guidelines* that access to the Waybill Sample would *not* be granted for the purpose of preparing for rate litigation. As the Board explained in that decision, a shipper group had specifically argued that access to waybill data before filing a complaint was "necessary and appropriate both for a shipper to determine whether to bring a complaint and to encourage pre-complaint settlement." *Small Case Guidelines* at 1054. The Board disagreed, noting that "data from the Waybill Sample is not needed for the information that must be included in the initial complaint." *Id.* The Board further stated that "pre-complaint access to the confidential Waybill Sample is not only unnecessary, but would be an inappropriate use of the Waybill Sample for a non-regulatory purpose if we were to foster its use in rate negotiations between shippers and carriers." *Id.* at 1054-55.

Thus, the Board has already addressed the issue whether pre-complaint access to the Waybill Sample would be permitted to prepare cases to be filed under the *Small Case Guidelines* and it definitively stated that such access would be denied. Applicants argue that the Board's ruling on this issue does not apply to them. They claim that the Board was really concerned about the use of waybill data in negotiations with railroads, but they are the State, not a shipper, so the data would not be used in negotiations. Request at 8, n.4. Applicants fail to acknowledge that the State of North Dakota has been an active participant in negotiations with BNSF over rates for grain shipments in North Dakota, as the State pointed out in testimony of Tony Clark, President, Public Service Commission of North Dakota, before the North Dakota Agriculture and Natural Resources Committee, November 17, 2005. ("After consultation among the North Dakota stakeholder groups regarding the state's negotiating position, state parties approached BNSF to propose a negotiating session to see if there were any opportunities for a negotiated settlement that would be acceptable to all parties.") The risk of inappropriate use of the data in this case is, if anything, magnified by the State's role in rate negotiations.

Applicants cannot circumvent the clear limitations imposed by the Board's regulations on access to confidential waybill data by seeking data under the Other Users provision of the regulation, 49 C.F.R. § 1244.9(c). That provision was not intended as backdoor way for designated user groups to obtain access to data to which they were denied when the regulations were adopted. In fact, the Other Users provision specifically states that it applies to "Users *other than* those described in paragraphs (b)(1) through (b)(5) of this section," which includes States and Transportation Practitioners. As representatives of the State of North Dakota, Applicants are entitled only to data relating directly to movements in their state. As prospective representatives of litigants in a rate reasonableness case, Applicants are entitled to data only after a valid complaint is filed. The waybill data request at issue here seeks far more data than that to which Applicants are entitled, and the request should therefore be denied.

III. APPLICANTS HAVE FAILED TO SHOW A NEED FOR THE REQUESTED DATA

Even if it were permissible for Applicants to seek data under 49 C.F.R. 1244.9(c) beyond that to which they would be entitled under other specific regulatory provisions, they would have to demonstrate a need for the data. *See* 49 C.F.R. § 1244.9(e)(iii). Applicants, however, have not shown that they need either set of data sought in the request -- data on BNSF movements generating revenues that are less than 100 percent of URCS variable costs or data for wheat movements on BNSF, UP or CP that generate revenues that exceed 180 percent of URCS variable costs. Applicants have confused the relevance standard governing access to information in the context of an actual litigation with the restrictive standard governing access to confidential waybill data. The relevance standard of discovery is not applicable here. Applicants must show that they *need* the requested data under 49 C.F.R. § 1244.9(c), not that the data would be relevant in a rate reasonableness case, and they have not made a showing of need.

As to the data on BNSF movements with RVC ratios less than 100, Applicants cannot even satisfy the relevance standard of discovery. Applicants claim that such data could be used to calculate an adjustment to the Board's Revenue Shortfall Allocation Methodology ("RSAM") to account for supposedly inefficient, below-cost pricing by BNSF. But as Applicants themselves acknowledge, the Board already addressed this issue in *BP Amoco v. Norfolk Southern ("BP Amoco")*, Finance Docket No. 42093 (served June 6, 2005), and concluded that such an adjustment to RSAM would not be appropriate. There, the Board found that only the unadjusted RSAM should be used in rate challenges under the *Small Case Guidelines*, thus obviating the need for the type of analysis contemplated by Applicants.

Applicants set out a lengthy critique of the Board's conclusion in *BP Amoco,* but it is inappropriate to litigate the *Small Case Guidelines* standards in the context of a request for access to the Waybill Sample. Under the law as it now stands, the data on movements that generate revenues below 100 percent of URCS costs is irrelevant to any issue in a case brought under the *Small Case Guidelines*. Any challenge to the existing law must be brought in a case that has been properly filed under those *Guidelines*.

As to Applicants' request for data for movements of wheat generating revenue over 180 percent of URCS costs, the request is a blatant fishing expedition. Applicants even acknowledge that they seek the data to *identify* a potential complainant to bring a rate reasonableness challenge. BNSF acknowledges that some waybill data for movements generating revenues that exceed 180 percent of URCS variable costs could be obtained through discovery by a complainant in a properly filed rate reasonableness case for the purpose of identifying comparable movements. But the proper scope of such discovery cannot even be addressed until a complaint is filed. No complaint challenging BNSF's rates has been filed. It is premature to address the proper scope of discovery for a case that may never exist.

For the foregoing reasons, BNSF respectfully submits that the Board should deny Applicants' request for the Costed Waybill Sample in its entirety.

Respectfully submitted,

Samuel M. Sipe, Jr.
Anthony J. LaRocca

Attorneys for BNSF

cc: Nicholas J. DiMichael
Andrew P. Goldstein